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No. 662

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

ROSE KIMEN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO,
a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

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I.

JURISDICTION OF THIS COURT.

A.

For this Court to assume jurisdiction it must affirmatively appear from the record that the Federal question was presented to and necessarily decided by the Supreme Court of Illinois.

Petitioner has not seen fit to include in the record presented to this Court any of the pleading and proceeding

first rule thereof deals with the applicability of the Civil Practice Act. This Rule No. 1 is as follows:

"APPLICABILITY OF CIVIL PRACTICE ACT.

Rule 1. All provisions of the Civil Practice Act with respect to review in civil proceedings by the Supreme or Appellate Courts shall apply to orders, determinations, decisions, judgments or decrees entered by trial courts on or after January 1, 1934. All suits in which a summons has been issued prior to January 1, 1934, but in which no pleadings have been filed by either party prior thereto, shall be governed by the Civil Practice Act. The provisions of the Civil Practice Act with respect to service of process issued on or after January 1, 1934 (sections 6, 10, 13-19), appearance (section 20) and trial practice (sections 48-73) shall apply to proceedings instituted prior to January 1, 1934, and not on trial prior to that day. Except as provided by this rule, or by written stipulation of parties, or by order of the court, upon notice and motion, proceedings instituted prior to January 1, 1934, shall not be governed by the Civil Practice Act."

Rule No. 71 provides that:

"These rules shall be in effect January 1, 1934, and be in lieu of all rules in the schedule to the Civil Practice Act, and of all other rules of this Court heretofore in force."

It thus appears that the procedure adopted by petitioner in following the Civil Practice Act and asking *"leave to appeal"* to the Illinois Supreme Court was not the proper practice as provided by law and the Supreme Court's denial of *"leave to appeal"* was not necessarily a refusal to review the judgment of the Appellate Court or an indication that it would not so review it if its jurisdiction had been properly invoked.

Prior to January 1, 1934, the method of reviewing decisions of the Appellate Courts by the Supreme Court was controlled by the Practice Act of 1907 (CAHILL'S ILLINOIS

Revised Statutes, 1933, Appendix LVI). This Act was repealed by Section 94 of the Civil Practice Act with the provision, however, that "nothing in this provision for repeal shall impair or affect any action or proceeding commenced before this Act shall have taken effect" (Chapter 110, Section 222, Cahill's Illinois Revised Statutes, 1933).

Under the Practice Act of 1907 (Chapter 110, Section 120, Cahill's Illinois Revised Statutes, 1933, Appendix LXXVI), it is provided that the method of securing a review by the Supreme Court of a judgment of the Appellate Court shall be by the Supreme Court granting on application a writ of certiorari requiring the Appellate Court to certify the case to the Supreme Court for its review and determination.

No request was made by petitioner to the State Supreme Court that it grant its writ of certiorari in this case, and in the absence of such a request it cannot be contended that the exercise by the State Supreme Court of the discretion placed in it by the State laws had been invoked.

In the proceedings before the State Supreme Court this respondent called to the Court's attention, by its answer to petitioner's application for leave to appeal, the fact that there was no authority or legal basis for the procedure adopted by petitioner. It cannot therefore be presumed that the Court's action was not prompted wholly by this fact and that if its discretionary power had been properly invoked it would not have granted the writ of certiorari, assumed jurisdiction, and determined the questions involved upon their merits.

For this Court to assume jurisdiction it must affirmatively appear from the record that a decision could not be had in the highest State Court upon the federal question involved. *Mullen* v. *Western Springs Beef Co.*, 123 U. S. 116.

It is well settled by the decisions of this Court that it will review the final decision of the highest court of a state only when the Federal right claimed has been asserted in a manner calling for a decision by such highest court under its established system of practice and pleading.

Atlantic Coast Line Railroad Company v. *Mims*, 242 U. S. 532.

Hartford Life Ins. Co. v. *Johnson*, 249 U. S. 490.

In *Newman* v. *Gates*, 204 U. S. 89, a judgment was entered in the State trial court against three persons. After judgment one of the judgment debtors died and the survivors appealed to the Appellate Court of the State without making the personal representative of the decedent a party thereto. The Appellate Court affirmed the judgment but the State Supreme Court on removal of the cause to that Court held that the appeal was defective because of failure to make the personal representative of the decedent a co-appellant, and dismissed the appeal without a determination upon the merits.

Upon a motion made in this Court to dismiss the writ of error under which the cause was brought here, this Court at page 95 said:

> "The removal of the cause from the Appellate Court into the Supreme Court of Indiana vacated the decision of the former tribunal, and after transfer the case stood in the highest court of Indiana as though it had been appealed to that court directly from the trial court. *Oster* v. *Brge*, 161 Ind. 114, 64 N. E. 918. Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdic-

tion of this court to review the judgments or decree of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such questions, when rendered by the highest court of a state in which a decision in the suit could be had, and as, for the want of a proper appeal, no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.

Writ of error dismissed."

C.

There is in the case at bar no substantial Federal question.

Petitioner cites on page 8 of his petition three cases involving national banks where the decisions of State courts were reviewed by this Court, and urges that these cases are indicative that questions involving the powers and obligations of national banks under their charters are federal questions entitling the parties thereto to a review in this Court. These cases were brought to this Court by writs of error at a time when the issuance of such writs was a matter of right. Since the amendment to the Judicial Code in 1916 such questions are now reviewable only when this Court has in the exercise of its discretion determined that they are substantial and of sufficient importance to warrant the review. We do not believe that there is here any such substantial federal question.

In this case the petitioner purchased and received from the respondent bank certain mortgage bonds for which she paid cash. In connection with this purchase the cashier of the bank gave to petitioner a written repurchase agreement dated November 1, 1929 (Rec., 3), in which, after ac-

knowledging the sale of the bonds and the price received therefor, he stated as follows:

> "Should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $35,000.00 and accrued interest."

The only federal question involved in this case was whether this repurchase agreement was *ultra vires* as being in violation of the express provision of Section 5136 of the National Bank Act as amended in 1927, wherein after enumerating the powers granted to national banks, it is provided:

> "That the business of buying and selling investment securities shall hereafter be limited to buying and selling *without recourse* marketable obligations evidencing indebtedness of any person, co-partnership, association or corporation, in the form of bonds, notes and/or debentures commonly known as investment securities."

But this Federal question was taken out of this case by the express waiver of petitioner in her petition to the Illinois Supreme Court for leave to appeal, as we have shown under Section I-A of this brief. And attorneys for petitioner consistent with such waiver have failed in their petition here to urge the validity of the repurchase agreement but have impliedly admitted that it is *ultra vires* and void and are basing their claim solely upon a "general assumpsit".

It follows that petitioner is not bringing here for decision any Federal question whatever. The question as to whether she is entitled to recover in assumpsit for money had and received does not involve the assertion by her of a right under a Federal statute.

D.

If the question of ultra vires were still involved, the decision of the State court is in accord with the applicable decisions of this Court.

Texas & Pacific Railway Company v. *S. O. Pottorff*, 291 U. S. 245, is an applicable decision by this Court of issues similar to those involved in the pending case. That case involved the validity of a pledge of assets of a national bank to secure a private deposit. This Court there held that national banks lack the power to make such a pledge because it is not conferred by Congress; that no estoppel arose out of the obtaining of such a deposit by the pledge of assets, and that such *ultra vires* contract even though fully performed gave rise to no rights thereon and did not estop the bank from challenging the legality of the power exercised.

In *Cassatt, et al.* v. *First National Bank of West New York*, 291 U. S. 660, this Court on January 15, 1934, denied a writ of certiorari to review the decision by the New Jersey Court of Errors and Appeals reported in 168 Atl. 585. That case involved the right of a national bank to purchase stock in another corporation and in that connection the New Jersey Court considered the 1927 Amendment to the National Bank Act. That court held against the power claimed and in its discussion of the issues gave attention to questions similar to the ones here involved and held that it was a contradiction of terms to say that a national bank which has no power whatever under the law to purchase speculative securities directly, may, nevertheless, make itself liable as a purchaser by acting as an agent for a customer of the bank as such conclusion would nullify the purpose of the statutory limitation of its powers, which is to conserve the

rights of its depositors and stockholders and enable it to perform unimpaired its functions as an agency of the Federal government. It further held that persons dealing with national banks are charged with limitation of their powers. These cases of very recent date indicate clearly that the decision of the State court in the case at bar is clearly in accord with the attitude of this Court.

II.

IMPLIED ASSUMPSIT.

A.

The repurchase agreement was against public policy and prohibited by statute, of which plaintiff was chargeable with notice. The courts will not give assistance to either party to such transactions but will leave them where it finds them.

In its opinion the Appellate Court quoted from the opinion in the case of *Knass* v. *Madison & Kedzie State Bank*, 354 Ill. 554, where the Court at pages 567-8 said:

> "Are such contracts as here relied upon void as against public policy or violative of statutory enactment? Contracts against public policy are generally unenforceable by any remedy. (Re-statement of the Law of Contracts, Am. Law. Ins., sec. 369.) Public policy is a principle of law which holds that no one may lawfully do that which has a tendency to injure the public or to be against the public good. Banks are quasi-public institutions. Their well-being concerns not only the stockholders but the depositors and public at large. Contracts are against public policy when they tend to injure the public. *Agreements such as are here involved fall within that category.* Recent experience, so general as to afford the basis of judicial notice, has shown that contracts not within the powers conferred on banks and which so jeopar-

> dize the safety of bank deposits as to result in their loss, tend to produce widespread injury to the public, and may properly be held void *though there be found no specific statutory prohibition against them.*"

In the case at bar as in the *Knass* case there was also a statutory prohibition against agreements of this character. It was provided by an amendment made in 1927 to the National Bank Act, Section 5136, under which the defendant was organized, that the business of the bank in buying and selling investment securities,

> "shall hereafter be limited to buying and selling without recourse marketable obligations."

It thus appears that the repurchase agreement in question is against public policy and illegal both because of its tendency to injure the public as well as because of the specific statutory prohibition against it.

Under these circumstances it is the policy of the courts to render no assistance to either party in connection with such transactions but to leave them where it finds them. Such contracts are *"generally unenforceable by any remedy."*

In *Norbeck & Nicholson Company* v. *State of South Dakota*, 32 S. D. 189, the Court at page 198, says:

> "Illegality of contract, arising from express prohibition of law based on public policy, renders the contract wholly null and void for any purpose, and precludes a recovery on an implied contract or on the *quantum meruit;* otherwise a means would be thereby furnished for the undoing of the law itself."

And further says:

> "The general rule is that illegal contracts—illegal by reason of being expressly prohibited by law—are unenforceable, and no one can acquire any legal right under such a contract. If one of the parties has performed in whole or in part he cannot avoid the con-

tract and recover from the adversary party a reasonable compensation for such performance. No right, therefore, arises out of an illegal transaction even on the theory of constructive contracts. The law leaves the parties to illegal contracts where it finds them, and gives them no assistance in extricating themselves from the situation in which they have placed themselves—no recovery can be had for services rendered thereunder, either on the express contract, or on an implied contract, or on *quantum meruit.*"

In *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, the Court at page 412, says:

"The question is not one involving want of authority to contract on account of irregularity of organization or lack of affirmative grant of power in the charter of a corporation, but a question of the absolute want of power to do that which is inhibited by statute, and, if attempted, is in positive terms declared 'utterly null and void.'

'The rule of law,' said Parker, C. J., in *Russell* v. *DeGrand*, 15 Mass. 35, 39 'is of universal operation, that none shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain.'

We cannot assist the plaintiff to get payment for efforts to accomplish what the law declared should not be done, and the judgment must be affirmed."

In *M. Hunter* v. *Pearl L. Wheate*, 31 A. L. R. 980 (289 Fed. 604), the Court at pages 982 and 983, says:

"It has long been the law that, where an action is founded upon an unlawful contract, the court will not interfere to relieve either of the parties thereto, in an action against the other, from the results thereof. In *Higgins* v. *McCrea*, 116 U. S. 671, 29 L. ed. 764, 6 Sup. Ct. Rep. 557, it was said: 'No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the

court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it.'

This was quoted from an earlier case. The authorities in support of this proposition are numerous, and only a few are referred to: *McMullen* v. *Hoffman*, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227, 53 L. Ed. 486, 29 Sup. Ct. Rep. 280; 1 C. J. 958.

This rule applies, whether the act is performed in the execution of a contract or not. In other words, it applies to transactions as well as to contracts, and hence the suggestion of appellee that the recovery here was upon the second count in the declaration as for a tort, regardless of the contract, is of no avail. If the act out of which the cause of action arises is immoral or illegal, the courts will not grant relief. *The Florida*, 101 U. S. 37, 25 L. Ed. 898; *Riggs* v. *Palmer*, 115 N. Y. 506, 5 L. R. A. 340, 12 Am. St. Rep. 819, 22 N. E. 188; *Levy* v. *Kansas City*, 22 L. R. A. (N. S.) 862, 93 C. C. A. 523, 168 Fed. 524. In the last-cited case, opinion by Sanborn, J., the authorities are exhaustively examined. It was said: 'But the maintenance of actions to recover moneys or property lost, or damages sustained, through transactions or contracts wherein the plaintiffs were guilty of moral turpitude, or of the violation of a general law passed to effectuate a public policy, is prohibited by this rule, as well as the maintenance of actions upon contracts of that nature.'"

In *Charles W. Flack, et al.* v. *John S. Warner, et al.*, 278 Ill. 368, the Court at page 375, says:

"This is a chancery proceeding. 'In general, where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala In se*, courts of equity, following the rule of law as to participators in a common crime, will not, at present, interpose to grant any relief.' (*Miller* v. *Marckle*,

supra, p. 154.) 'It is a principle of equity that where a contract is illegal, immoral or against public policy, or has been entered into through fraud or to accomplish any fraudulent purpose, a court of equity will not, at the suit of one of the parties, a *particeps doli*, while the agreement is still executory, either compel its execution or decree its cancellation, nor, after it has been executed, set it aside, and thus restore the plaintiff to the property or other interest which he has fraudulently or illegally transferred. Equity will leave such parties exactly in the position in which they have placed themselves, refusing all affirmative aid to any of the participants."

In *Ernest J. Seitz* v. *Theodore Michel* (Minn. Supreme Ct.), 181 N. W. 102, 12 A. L. R. 1060, the Court at page 1067, says:

"A court will not directly enforce a contract or recognize it by awarding damages for its breach if it is contrary to public policy, but will leave the parties where it finds them, not out of consideration for the rights of either, but because the contract is injurious to or contravenes some interest of society or of the state. *Adams* v. *Adams*, 25 Minn. 72; *Peterson* v. *Christenson*, 26 Minn. 377, 4 N. W. 623; *Boyle* v. *Adams*, 50 Minn. 255, 17 L. R. A. 96, 52 N. W. 860; *Holland* v. *Sheehan*, 108 Minn. 362, 23 L. R. A. (N. S.) 510, 122 N. W. 1, 17 Ann. Cas. 687; *Buck* v. *Walker*, 115 Minn. 239, 132 N. W. 205, Ann. Cas. 1912D, 882; Dunnell's Dig. 1885."

Cases cited by petitioner do not involve transactions which were violative of public policy and specifically prohibited by law. They are based upon unjust enrichment arising from acts which while *ultra vires* were not of a nature injurious to the public. However, there is in this record no evidence of benefits received by the defendant growing out of the *ultra vires* agreement.

In the trial of this case the plaintiff offered no evidence of the amount of any benefit accruing to the bank

from the sale of the bonds. The bonds were not the obligations of the bank, they were the obligations of another corporation, "The First National Company," and the only benefit the defendant bank could have gained was any sum in the nature of a commission or profit for handling the bonds. If the bonds had been the obligation of the bank which because of some defect were void, the bank would have received money for which nothing of value was given in return. But such was not the case. The bonds were purchased by the bank with its own funds and this purchase and the subsequent sale to the plaintiff and the payment by the plaintiff of the purchase price taken alone was a valid transaction. It was only the repurchase agreement that was void for illegality.

The bank cases cited were all decided prior the 1927 Amendment to the National Bank Act and permitted recovery only for unjust enrichment arising out of the *ultra vires* transactions, such as money borrowed and received by the bank through the unauthorized action of an officer; money actually obtained by the bank as the result of a guaranty beyond the power of the bank; coin bought in behalf of the bank by the cashier without authority of the bank but within the power of the corporation and profit actually made from the repudiated agreement of the bank in purchasing bonds. The case of *Coon* v. *Smith,* was a decision of the Federal District Court and was based largely upon the first decision of the *Awotin* case which was subsequently reversed.

B.

The purpose of the limitation restricting the sale of investment securities to sales made "without recourse" was the protection of the public at large from widespread bank failures as well as for the protection of the depositors and stockholders of the bank; this purpose would not be fulfilled by granting substantially the same relief under the common counts as is denied under the illegal contract.

As is pointed out in the case of *Knass* v. *Madison & Kedzie State Bank*, 354 Ill. 559, the serious danger arising from these repurchase agreements is the contingent liability to which the bank is subjected. Against this liability the bank is powerless to take the necessary steps for its protection, the maturing of these agreements at or about the same time by a large number of purchasers may bring about the complete destruction of the banking institution and prevent the performance of its functions as an agency of the federal government as well as great loss to depositors and stockholders who rightfully rely upon government inspections and regulations for their protection.

The purpose of the limitation of the National Bank Act restricting the sale of investment securities to sales "without recourse" is the prevention this contingent liability and the protection of the public as well as of depositors and stockholders. This purpose would not be accomplished by the courts if they granted substantially the same relief under an implied contract as they denied under the illegal contract. In the *Knass* case it is said that "the law does not prohibit and also enforce a contract."

The case of *Cassatt, et al.* v. *First National Bank of West New York*, 168 Atl. 585, is a recent decision by the New Jersey Court of Errors and Appeals and is also

reported in the last volume of American Law Reports Annotated, recently issued, at page 1302 (89 A. L. R. 1302). This case involved the right of a national bank to purchase stock in another corporation, and in that connection the Court considered the 1927 amendment to the National Bank Act. The Court held against such power. In its discussion of the issues involved the Court gave attention to a question similar to the one here involved.

The Court there says (89 A. L. R. 1307):

> "This leads us to approve of the argument of the respondent, that, 'It is a contradiction in terms to say that a national bank which has no power whatsoever, under the law, to purchase speculative securities directly may, nevertheless, make itself liable as a purchaser, by acting as an agent, for a customer of the bank. Such a conclusion would nullify the purpose of the statutory limitation upon its powers, which is to conserve the rights of its depositors and stockholders and enable it to perform, unimpaired, its functions as an agency of the federal government.'"

The Court further says on page 1308:

> "Further, that persons dealing with national banks are charged with notice of their limitations, citing *McCormick* v. *Market National Bank*, 165 U. S. 538, 550, 17 S. Ct. 433, 41 L. Ed. 817, and *California Bank* v. *Kennedy, supra*. This also is undoubtedly so."

The opinion was concurred in by all fifteen judges participating in the hearing and a petition for writ of certiorari was denied by the Supreme Court of the United States on January 15, 1934. (291 U. S. 660.)

When the object to be accomplished is in violation of public policy the courts do not hesitate in denying relief even though the contract sought to be enforced is not illegal.

In *Henry H. Ingersoll, et al.* v. *Coal Creek Coal Company, et al.*, 117 Tenn. 263 (98 S. W. 178) 9 L. R. A. 282, the Court at page 294 of L. R. A., says:

> "It is insisted that the contracts made are not illegal. This, we think, does not reach the root of the case, as the contracts themselves, abstractly considered, may be legal; and yet there may be circumstances surrounding their making which would deter the courts from enforcing them, or rights based on them, when all the facts are divulged and the nature of the consideration appears."

CONCLUSION.

We have shown that this Court is without jurisdiction to issue the writ of certiorari herein because the discretion of the Supreme Court of Illinois as to whether it should review the judgment of the Appellate Court was never properly invoked, and because there is no affirmative showing as to the method by which it was sought to invoke such discretion. We have also shown that petitioners claim based solely upon an implied promise to repay money had and received does not involve the assertion of a right under the National Bank Act and is not a federal question; that this claim arising out of a transaction prohibited by law and against public policy can give rise to no enforcible obligation, particularly in the absence of any benefits received therefrom by Respondent.

We, therefore, ask that petitioners' prayer for the issuance of the writ of certiorari be denied.

Respectfully submitted,

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